



DEPARTMENT OF THE ARMY

DEFENSE LANGUAGE INSTITUTE FOREIGN LANGUAGE CENTER & PRESIDIO OF MONTEREY
INSTALLATION LEGAL OFFICE
1336 PLUMMER STREET, BUILDING 275
MONTEREY, CA 93944-3327

REPLY TO
ATTENTION OF

ATZP-JA

9 July 2004

MEMORANDUM FOR ALL

SUBJECT: Powers of Attorney

INTRODUCTION - A power of attorney is a document that allows another person or institution to act as your legal agent. For example, you might issue a power of attorney to allow someone to ship or receive your household goods, sign for your government quarters, sell your car, cash an income tax refund check, etc. The person who issues a power of attorney is called the principal, and the person who acts as agent is called the attorney-in-fact. There are two basic types of powers of attorney: general and special.

Powers of Attorney prepared in military legal offices include a preamble citing Title 10, United States Code, Section 1044b, indicating that Federal law exempts this power of attorney from any requirement of form, substance, formality, or recording that is prescribed for powers of attorney by the laws of a State, the District of Columbia, or a territory, commonwealth or possession of the United States; and specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented. This provision is intended to facilitate the use of the power of attorney outside of Texas. This highlights one of the disadvantages of powers of attorney-a third party is not legally required to deal with your agent.

1. TYPES OF POWER OF ATTORNEY

- a. **General** - A general power of attorney allows your agent to do almost anything you could do by signing your name. However, there are some things that are so personal in nature that they cannot be delegated to an agent, e.g., a marriage ceremony or the execution of a will. Also, there are times when a certain form of power of attorney is required, such as the special form of power of attorney used by the IRS when a person allows a friend or relative to cash an income tax refund check.
- b. **Special Power of Attorney** - This type of power of attorney lists a particular act or acts that your agent is authorized to do and limits the agent to those acts. The agent can, of course, be authorized to do more than one legal act in a single special power of attorney. You can use a special power of attorney to allow someone to do almost all legal actions that you can do yourself. Thus, for example, you could prepare a special power of attorney that lets your designated agent:

1. Buy or sell real estate;
2. Purchase a car or sell your furniture;
3. Sign your paycheck or withdraw money from your bank account;
4. Admit your child to the hospital for necessary medical care;
5. Ship or store your luggage and household goods;
6. Sign your name to a lease or an agreement to connect utilities, such as electricity, gas, oil or telephone service;

These are just a few of the many things that can be done with a special power of attorney. All you have to do is prepare the special power of attorney with a specific description of what is the particular act or deed to be done (and who is the agent that you authorize to do it).

2. **DURABLE POWER OF ATTORNEY** - You can obtain a durable Power of Attorney from this office. This means that the Power of Attorney would remain effective even if you, the Principal, become legally incompetent.
 - a. **Requirements** - Some state require that the Power of Attorney be recorded (filed) in the county clerk's office in the county in which you currently reside. In Texas, recording is not required. The Power of Attorney must contain the durability language and must have been signed before a Notary Public. The filing requirement also does not apply to a Power of Attorney executed for medical care. The specific information regarding filing instructions and fees can be obtained by calling the county clerk for your county. A disadvantage of filing the Power of Attorney is that it becomes a public record. This allows any member of the public who wishes to see it to go to the court where it is filed and view or copy the document.
 - b. **Duration** - A durable power of attorney can be made effective immediately when signed and continue to be effective until it is revoked, you or your agent die, a time limit set out in the instrument is reached, or a guardian of your estate is appointed. However, you may prefer to provide that the agent cannot act in your place unless you are incapacitated or disabled.
3. **PREVENTING ABUSE** - A power of attorney can be abused as well as used. If you are giving a Power of Attorney to someone, you should carefully consider the decision of who you wish to name as your agent. Your agent will have the power to act as if they were you, while using the Power of Attorney. The extent of their actions is limited to the authority you gave them in the Power of Attorney. This means that you will be the one held liable for your agent's actions with the Power of Attorney. You are responsible for

damages and would then have to try to recover from your agent whatever damages you are forced to pay. For example, a husband who just separated from his wife might use the power of attorney she gave him to clean out her individual bank account, or a well-meaning older person might give a power of attorney to a younger relative, only to discover that the relative squandered and spent the assets of the older person.

- a. Guidelines -Here are some guidelines and precautions that will help prevent abuse:
 1. Never have a power of attorney unless you need one.
 2. If you feel you might need a power of attorney, have one prepared but don't sign it until you need it.
 3. Always put an expiration date on your power of attorney; never make a power of attorney that lasts indefinitely. We recommend you limit how long the Power of Attorney will be effective as much as possible. If you only need a Power of Attorney for a limited period, for example a one month NTC rotation, then you should limit the Power of Attorney to that period. Any General Power of Attorney issued by this office will expire three years from the date it is issued unless you specify an earlier date on the Power of Attorney. Some Special Powers of Attorney may not have an expiration date; if so, they become ineffective when the authorized act is accomplished.
 4. Make sure your expiration date is for a fairly short period of time.
 5. Never use a general power of attorney when a special one will do.
 - b. Standby Trust - If you don't have a relative or close friend who is responsible or trustworthy enough to be your agent under a durable power of attorney, you may want to consult an estate planner on setting up a standby revocable trust. Such trusts ordinarily have corporate trustees, such as banks. They should contain special provisions defining incapacity and disability and dictating the conditions upon which the trust becomes effective. They are revocable while you are competent. In some cases, they can be nominally funded so that the majority of your assets do not go into the trust until you become incompetent. This usually requires that someone be given the power to transfer the rest of your assets to the trust if you become incompetent.
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4. LIMITATIONS - A Power of Attorney may not work at every location. For example, many banks require that you and your representative sign the bank's own signature card. The IRS will accept a Power of Attorney if the Power of Attorney states the specific tax years that the Power of Attorney may be used for, or, you may use the IRS Power of Attorney (IRS form 2848). The Veteran's Administration also requires specific language in a power of attorney for VA loans. You may wish to find out in advance whether those

places that you plan to use the Power of Attorney will require you to use a specific form or signature card.

5. **TERMINATION AND REVOCATION** - Your agent's authorization to act on your behalf ends on termination of the power of attorney by your death, your agent's death, expiration of the term recited in the power of attorney, destruction of the original power of attorney or by execution of a document called a Revocation of Power of Attorney. You may wish to execute a revocation for a variety of reasons, for example if you are dissatisfied with your agent, the purpose for the power of attorney has been fulfilled or, if for any reason, you wish to terminate the authority of the agent to act on your behalf.

You must notify your agent that you have revoked the Power of Attorney. Otherwise, your agent may be able to continue acting on your behalf. You should also consider giving a copy of the revocation to your major creditors and any agency/business where the Power of Attorney has been used or you suspect the agent may try to use it. The revocation must be signed and notarized. Notification to the agent should be by certified mail (restricted delivery) or in person with disinterested witnesses.

6. **VII. DURABLE POWER OF ATTORNEY FOR HEALTH CARE** - A durable power of attorney for health care (also called a health care proxy) is a formal writing which gives you the ability to name another person (your agent) to make health care decisions for you if you ever become unable to make those decisions yourself. This is not the same as the durable power of attorney discussed above, which is primarily for your financial affairs.
 - a. **Authority of Your Agent** - This authority given to your agent is very broad and allows him or her to consent, withdraw consent, or refuse to consent to procedures for diagnosing and treating your physical and mental condition. Furthermore, the durable power of attorney for health care authorizes your designated agent to decide whether or not to remove you from life-support equipment. Before your agent will have authority to act, a doctor must certify in writing that you are unable to make your own health care decisions.
 - b. **Definition of Health Care and Restrictions on Authority**- Health care includes any service, treatment or procedure to maintain, diagnose or treat your physical or mental condition, including termination of life support systems, under certain circumstances. Your agent cannot consent to abortion, convulsive treatment or psychosurgery. As with any power of attorney, you should carefully consider whether you want to grant such power to someone else and who your agent should be.
 - c. **Requirements** - There are a number of requirements which must be met in order to execute a durable power of attorney for health care. First, both you and your agent must be at least eighteen years old or have had the disabilities of minority

removed (e.g., have been married). However, your agent cannot be your physician or an employee of a home health agency, hospital, nursing home, or residential care home unless the person is a relative or unless he or she chooses to give up that position in order to be your agent. Second, the durable power of attorney for health care must be written and you must sign it in the presence of two witnesses. If you are unable to sign it yourself, another person may sign your name for you if in your presence and at your express direction. Third, the two witnesses should be at least eighteen years old and disinterested. At the time of signing, a witness must not be the person you designated as your agent, your beneficiary under your will or deed, or a creditor or other person who may have a claim against you. Finally, you must deliver the durable power of attorney to your agent.

- d. Health Care Power of Attorney and Living Wills - Your agent must follow your instructions when making decisions on your behalf. For example, your agent must follow instructions that you have provided to your doctors in a living will or advance medical directive. If you have not provided your agent guidance, he or she has the authority to make decisions on your behalf using his or her best judgment as to what your wishes would be.
- e. Revocation - After you have issued a health care power of attorney, you retain the right to make your own health care decisions, and no treatment can be given or stopped over your objection. You also have the right to revoke your agent's authority at any time. If you revoke your agent's authority, you should ensure that all copies of the POA are destroyed. Therefore, it is better to keep the document in a safe location, known to your agent, rather than to give it to your agent right away. You may revoke a durable power of attorney for health care by oral or written notification to the agent or health care provider or by any other act which shows your intent to revoke the document. This is true regardless of your mental state, competency, or capacity to make health care decisions. You may also revoke any durable power of attorney for health care by simply executing a new one to replace it. A durable power of attorney for health care will be automatically revoked upon divorce from someone you designated as your agent. Automatic revocation also happens if you regain your capacity to make health care decisions. If a guardian is ever appointed for you, then the court will determine whether or not to revoke the durable power of attorney for health care.
- f. Making Changes - If you desire to make changes to the DHCPOA, you should prepare a new document and destroy the old one. You should also consider naming alternate agents in case your primary agent is unable or unwilling to serve.